No. 87-1968

In The
Supreme Court of the United States
October Term, 1987

DINO BELLO, an individual, and
SIMMONS PARK PROPERTIES, INC.,
a corporation,
Petitioners,

vs.

NORMAN L. WALKER, JOHN E. KANON,
JAMES M. MARTIN, JOSEPH J. URBANOWICZ,
HARRY E. BABINGER, JAMES E. HADSEL,
YVONNE A. RIGATTI, GLENN TRAUTMAN,
WILLIAM W. RUHL, WILLIAM G. DODDS,
PATRICIA M. PRICE, CONCETTA SERDY,
and REID W. McGIBBENY, individuals,
Respondents.

DINO BELLO, an individual and
SIMMONS PARK PROPERTIES, INC.,
a corporation,
Petitioners,

vs.

MUNICIPALITY OF BETHEL PARK,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE DENIAL OF A BUILDING PERMIT FOR A PARTICULAR USE IS A TEMPORARY TAKING DENYING A DEVELOPER ALL USE OF HIS LAND.

2. WHETHER THE DENIAL OF A BUILDING PERMIT FOR A PARTICULAR USE WITHOUT ANY RESERVATION OF ANY PART OF THE PROPERTY FOR A PUBLIC PURPOSE IS A TAKING UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

3. WHETHER THE FEDERAL COURTS HAVE JURISDICTION TO GRANT RELIEF TO A DEVELOPER WHO FAILS TO AVAIL HIMSELF OF THE STATE PROCEDURES FOR CLAIMING A TAKING BY INVERSE CONDEMNATION.

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The respondents file the following Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the United States.

ADDITIONAL STATUTE INVOLVED

Section 502 of the Pennsylvania Eminent Domain Code, Act of June 22, 1964, P.L. 84, 26 P.S. § 1-502 provides in pertinent part:

> § 1-502 PETITION FOR THE APPOINTMENT OF VIEWERS
>
> (e) If there has been a compensable injury suffered and no declaration of taking therefor has been filed, a condemnee may file a petition for the appointment of viewers substantially in the form provided for in subsection (a) of this section, setting forth such injury.

REASONS RELIED UPON FOR DENIAL OF THE PETITION FOR WRIT OF CERTIORARI

The United States Court of Appeals for the Third Circuit's decision that under the facts of this case there was not an unconstitutional taking is in conformity with this Court's opinion in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, — U.S. —, 107 S.Ct. 2378, — L.Ed.2d — (1987), its antecedents and the decisions of all other Circuit Courts of Appeals which have addressed this issue.

In the *Church of Glendale* case, *supra*, this Court held that an unconstitutional temporary taking may occur when a property owner is precluded by regulation from any use of his property but refused to extend that holding

to denials of specific uses of property such as those that occur in the permit approval process.

In this case, the developer had an approved site plan which was divided into five phases. He developed the first phase which contained 47 units. He did not apply for approval to develop the second, third or fourth phase even though if he had done so approval would have been granted so long as the property was developed in sequential order. The only portion of land for which a taking could even be claimed is the fifth phase on which he was denied the right to construct town houses without first constructing the second, third and fourth phase. The developer did not allege or offer evidence that the property in question could not be used for other purposes. In fact in the Petition filed with this Court, the developer admitted that other uses were made of this property during the appeal period since roads and sewers were installed on the land (p. 12). Thus, unlike the *Church of Glendale* situation, the land did not lie barren and unused during the course of the litigation.

Further, even if the developer had been denied all use of his land by virtue of the denial of the building permit, the developer would not have a taking claim recognizable in Federal Court. In *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), this Court held that condemnation damages may not be awarded in an action brought under 42 U.S.C. § 1983 unless there is no state remedy by which inverse damages may be awarded. In the *Church of Glendale* case, *supra*, this Court found that the landowner pursued its claim properly in

state court and that an inverse condemnation claim had been denied by the state court. 105 S.Ct. at 2384, fn. 6. Here the developer has never availed himself of the procedure available under Pennsylvania law to seek damages for inverse condemnation. *See* Eminent Domain Code, Act of June 22, 1964, P.L. 84, 26 P.S. § 1-502; *Petition of Borough of Boyerstown*, 466 A.2d 239, 77 Pa. Commonwealth Ct. 357 (1983).

The developer's assertion that under prior opinions of this Court, the Third Circuit was required to find that an arbitrary application of zoning laws is a taking is not substantiated by a review of those cases. In *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), this Court held that when a developer is merely limited but not prevented from using his property, no unconstitutional taking occurs. That decision is consistent with the *Church of Glendale* case, *supra* and the decision of the Third Circuit in this case in which the Court held that no taking occurred since the developer was not denied all use of his land by the denial of the building permit. *Accord, Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

Nollan v. California Coastal Commission, 483 U.S. —, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987) involves a direct taking of property since there the governmental agency conditioned the granting of a building permit on the reservation of an easement to the public. The Court found that this was an appropriation of private property for public use and not a mere restriction on use. The *Nollan*, case, *supra*, does emphasize, however, the difference between this case and all of the Supreme Court cases cited

by the developer. In each of those cases, the landowner's owner property or a part thereof was reserved for public use or enjoyment (*Church of Glendale*-preservation of flood plain; *Agins*-open space requirement; *Nollan*-public easement; and *Penn Central*-appropriation of air space) whereas in this case a building permit was denied but neither the property nor a portion thereof was reserved for public use or enjoyment. The developer's claim in this case is not even premised on "private property" being "taken for public use". Thus, not only is his claim not supported by prior Supreme Court cases, it is not founded upon the taking provision of the Fifth Amendment to the United States Constitution.

The Circuit Court cases cited by the developer are not in conflict with the decision of the Third Circuit nor do they support the developer's position that there is no distinction between the due process and taking clause of the Fifth Amendment to the United States Constitution.

Wheeler v. City of Pleasant Grove, 664 F.2d 99 (5th Cir., 1981) was decided without any discussion of either the substantive due process clause or the taking clause of the Fifth Amendment. The developer greatly overemphasizes the importance of that case by arguing that the Court analyzed the two clauses and determined that a violation of the due process clause was *a fortiori* a taking under the Fifth Amendment. The Court never even considered that issue.

However, in a later appeal of that same case, the court refined its prior ruling to hold consistent with the holding of the Third Circuit in this case that there cannot be a taking under the Fifth Amendment when there is no

public use of the property, however, if the land restriction is arbitrary a due process violation may be asserted. *Wheeler v. City of Pleasant Grove*, 833 F.2d 267 at 270, Fn 3 (11th Cir., 1987).

Also, the developer disregarded the decision in *Rymer v. Douglas County*, 764 F.2d 796 (11th Cir., 1985) where the same Circuit Court which decided the *Wheeler* case, *supra*, held that a taking does not occur unless the property owner alleges that it has been denied all viable economic uses of its property. 764 F.2d at 800.

No Court including this Court has even intimated in dictum that it would stretch the taking clause under the Fifth Amendment and apply it to a factual situation such as the one in this case. The Third Circuit properly interpreted the Constitution and the cases decided under it in distinguishing between the due process and the taking for public purpose clauses of the Fifth Amendment. Review of that decision is not required to reconcile a split among the various Circuit Courts or to correct a misinterpretation of this Court's prior rulings.

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CONCLUSION

For all the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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